IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

AUG 28 1998

Michael N. Milby, Clerk

DIANNE L. BATA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-97-1985
	§	
	§	
SHELL FEDERAL CREDIT UNION,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case was referred by United States District Judge Vanessa D. Gilmore, for full pretrial management, under 28 U.S.C. § 636(b)(1)(A) and (B). (Docket Entry #19). Before the court is a motion for summary judgment that was filed by Defendant Shell Federal Credit Union ("SFCU" or "Defendant"). (Docket Entry #26). Plaintiff Dianne L. Bata ("Bata" or "Plaintiff") has responded to this motion. (Docket Entry #28). After reviewing all of the pleadings to date, and the applicable law, it is RECOMMENDED that Defendant's motion for summary judgment be GRANTED, in part, and DENIED, in part. (Docket Entry #26).

1. Background

On June 10, 1997, Bata filed this employment discrimination lawsuit against SFCU. (Plaintiff's Original Complaint ["Complaint"], Docket Entry #1). Bata complains that SFCU terminated her employment, unlawfully, because of her gender. (Complaint ¶¶ 12, 17). In particular, Bata alleges that she was terminated because she was pregnant, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), codified as amended at 42 U.S.C. § 2000e *et seq.* (Complaint ¶¶ 6-17). Bata has also filed claims for wrongful discharge and for the intentional

30

infliction of emotional distress under Texas law. (Complaint ¶¶ 17, 19). Bata seeks "back pay and benefits"; compensatory damages for "emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life"; "exemplary damages"; "prejudgment and postjudgment interest"; court costs; expert witness fees; and, attorney's fees. (Complaint ¶ 23).

The summary judgment evidence shows that Bata was employed by SFCU as a "loan clerk", from September 8, 1992, until she was terminated from that position on July 10, 1996. (Exhibit A, Deposition of Dianne L. Bata ["Bata Deposition"], pp. 28-30, Docket Entry #29). Bata contends that, prior to her termination, she had received positive performance evaluations from her supervisors. (Bata Deposition, pp. 35-38; *see also* Exhibit B, Deposition of Glenda Gayle Davis ["Davis Deposition"], p. 24; Exhibit C, Deposition of Janice McDaniel ["McDaniel Deposition"], p. 107, Docket Entry #29).

On May 21, 1996, Bata was pregnant with her second child. (Bata Deposition, pp. 47-48). On that date, Bata's work area was under construction as part of a remodeling effort at SFCU. (Bata Deposition, p. 47). Bata claims that, as soon as she arrived at work, "all of us ... started smelling [fumes from the construction]" that were so strong "we could hardly breathe." (Bata Deposition, pp. 46-47). Bata alleges further that she was "overwhelmed" by the "toxic smell". (Bata Deposition, p. 46). Bata reportedly told her supervisor, Gayle Davis ("Davis"), that the fumes were making her ill "due to [her] pregnancy." (Bata Deposition, pp. 47-48). Davis allegedly told Bata to contact her physician. (Bata Deposition, p. 48). Bata's obstetrician, Dr. Juan Montoya ("Dr. Montoya"), instructed her to "leave and immediately come to [his] office." (Bata Deposition, p. 49). Dr. Montoya "recommended" that Bata "stop working [at SFCU] until the construction was over and her [workplace] was environmentally safe for her to come back to work." (Exhibit B, Deposition of Dr. Juan Montoya ["Montoya Deposition"], p. 12, Docket Entry #26). Bata returned to SFCU on May 22, 1996, but left again after the fumes made her ill. (Bata Deposition, p. 61). Bata never returned to work after that date. (Bata Deposition, pp. 83-84).

On June 27, 1996, Bata received a letter from SFCU's president, David S. Stuart ("Stuart"), informing her that she had "used all of [her] available sick time", and asking her to return to work. (Supplemental Exhibit A, Letter to Dianne L. Bata from David S. Stuart ["Stuart Letter"] ¶ 4, Docket Entry #29). Stuart advised Bata that her "position as a loan clerk requires a full time employee." (Stuart Letter ¶ 4). Stuart warned Bata that "if [she] [did] not return to work on a full time basis by Monday, July 8, 1996, we [would] conclude that [she] ha[s] voluntarily abandoned [her] employment ... and that [she] no longer desire[s] to work here." (Stuart Letter¶ 5). Bata replied, in writing, that she "[had] no intention of voluntarily abandoning [her] job", but that her physician had "placed [her] on restriction from returning to work because the fumes and chemicals in the environment could jeopardize [her] pregnancy." (Supplemental Exhibit B, Letter to David S. Stuart from Dianne Bata ["Bata Letter"], Docket Entry #29). Bata alleges that she had a telephone conversation with Stuart, on June 28, 1996, in which he "informed her that the work environment was again safe and that he would supply documentation to her doctor indicating same so that she could be released to return to work." (Complaint ¶ 7). Bata claims that she was willing to return to work when such documentation was provided to her physician, but that no documentation ever surfaced. (Bata Deposition, pp. 99-100). Bata did not return on July 8, 1996, as instructed by Stuart, and so was terminated on July 10, 1996. (Bata Deposition, p. 100).

Bata contends that she was "subjected to sex discrimination" by SFCU based on her pregnancy. (Complaint ¶¶ 6, 17). She complains that "as a proximate result" of Defendant's acts she has suffered "mental anguish, loss of wages and benefits, and loss of other economic advantages and employment opportunities." (Complaint ¶ 20). Bata claims further that, as a result of Defendant's conduct, she has suffered "severe" emotional distress. (Complaint ¶ 19). On the other hand, SFCU contends that Bata was terminated because she "refused to return to work." (Defendant's Motion for Summary Judgment, p. 2, Docket Entry #26). In response, Bata claims that the stated reason for her termination is a pretext for unlawful discrimination because another female, but non-pregnant, SFCU employee was not discharged for similar absences. (Plaintiff's Response to Defendant's Motion for Summary Judgment, pp. 2, 6-8, Docket Entry #28).

Defendant has filed a motion for summary judgment, arguing that Bata's Title VII claim fails, as a matter of law, because she "can point to no conduct that was discriminatory." (Defendant's Motion for Summary Judgment ["Defendant's Motion"], p. 2, Docket Entry #26). Defendant maintains that Bata has not made a *prima facie* case under Title VII, and that even if she has, she cannot show that the stated reason for the decision to terminate her was a pretext for unlawful discrimination. (Defendant's Motion, pp. 5-7). Defendant also contends that Plaintiff's state law claim, for wrongful discharge, fails because, as an "employee-at-will", Bata "could have her employment terminated at any time and for any reason." (Defendant's Motion, p. 13). In addition, Defendant argues that Bata's intentional infliction of emotional distress claim fails, as a matter of law, because she cannot demonstrate that any of SFCU's actions constitute "extreme and outrageous conduct". (Defendant's Motion, pp. 10-11). Defendant, therefore, requests a summary judgment in its favor on all of Bata's claims. (Defendants' Motion, p. 14). In response, Bata argues that summary judgment is not appropriate because genuine issues of material fact remain. (Plaintiff's Response to Defendants' Motion for Summary Judgment ["Plaintiff's Response"], pp. 1-2, Docket Entry #28).

2. **Standard of Review**

In considering a motion for summary judgment, a court must review the material factual issues and give the non-moving party the benefit of every reasonable inference with respect to the facts alleged by that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1078 (5th Cir.), *cert. denied*, 116 S. Ct. 532 (1995). The entry of summary judgment is appropriate only if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747 (5th Cir. 1996). "Of course, 'the substantive law will identify which facts are material.'" *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996)(*quoting Anderson*, 477 U.S. at 248). "A factual dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997)(*citing Anderson*, 477 U.S. at 248).

The burden is on the moving party to convince the court that no genuine issue of material fact exists as to the claims asserted by the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Rizzo v. Children's World Learning Ctrs. Inc.*, 84 F.3d 758, 762 (5th Cir. 1996). The non-moving party may not rest solely on its pleadings, however. *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 461 (5th Cir. 1996). For issues on which the non-movant will bear the burden of proof at trial, that party must produce summary judgment evidence and designate specific facts which indicate that there is a genuine issue for trial. *Celotex*, 477 U.S. at 322-24; *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). In an employment discrimination case, courts must "focus on whether a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff." *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139 (5th Cir. 1996)(citations omitted).

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). To meet its burden, the non-moving party must present "significant probative" evidence indicating that there is a triable issue of fact. *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994). If the evidence rebutting the summary judgment motion is "merely colorable, or is not significantly probative, summary judgment may be granted." *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 495 (5th Cir. 1998)(*citing Anderson*, 477 U.S. at 249-50). "In response to motions for summary judgment, it is therefore incumbent upon the non-moving party to present evidence — not just conjecture and speculation — that the defendant ... discriminated against [the] plaintiff on the basis of a [protected class]." *Grimes*, 102 F.3d at 140 (*citing Little v. Liquid Air Corp.*, 37 F.3d 1069, 1079 (5th Cir. 1994)(en banc)).

3. Discussion

A. Claims Under Title VII

It is axiomatic that Title VII prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Under Title VII, "sex" has been defined to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions". 42 U.S.C. §2000e(k). Accordingly, Title VII also governs claims of "pregnancy discrimination." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1044 (5th Cir. 1998)(*citing* 42 U.S.C. § 2000e(k)).

To prevail under Title VII, it is well-settled that a plaintiff first must establish a *prima facie* case by a preponderance of the evidence. *Rhodes v. Guiberson*, 75 F.3d 989, 992 (5th Cir. 1996)(*en banc*)(*citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). A *prima facie* case, once established, "raises an inference of unlawful discrimination." *Id.* The burden of production then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the challenged employment practice. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996)(*citing Bodenheimer*, 5 F.3d at 957). "A defendant may meet this burden by presenting evidence that, '*if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.'" *Rhodes*, 75 F.3d at 992 (emphasis in original). "If the employer presents such evidence, then the burden of production shifts back to the plaintiff to present probative evidence that the employer's stated reason was pretext." *Brown*, 82 F.3d at 654.

To make a *prima facie* case of unlawful discrimination, due to her pregnancy, Bata must establish the following elements: "(1) that she was a member of a protected class; (2) that she was qualified for the position she lost; (3) she suffered an adverse employment decision; and (4) that others similarly situated were more favorably treated." *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998)(*citing Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Here, Bata complains that SFCU discriminated against her, on the basis of her pregnancy, because another employee who engaged [in similar conduct] was treated more favorably. (Plaintiff's Response, p. 6). Because Bata's allegations can be said to involve a "work-rule violation", that analysis is illustrative. In work-rule violation cases, a plaintiff may establish a *prima facie* case by showing "either that [s]he did not violate the rule or that if [s]he did, [non-pregnant] employees who engaged in similar acts were not punished similarly." *Mayberry*, 55 F.3d at 1090 (*citing Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir.), *cert. denied*, 449 U.S. 879 (1980)). To establish such a *prima facie* case, a "plaintiff must show that [non-pregnant] employees were treated differently under circumstances nearly identical to [hers]." *Mayberry*, 55 F.3d at 1090 (*citing Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990); *Davin v. Delta Airlines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B. 1982)). To defeat summary judgment on the basis that another employee, situated similarly to Bata, was treated in a different fashion, she must show "that the misconduct for which she was discharged was nearly identical to that engaged in by a [non-pregnant] employee whom [Defendant] retained." *Smith*, 891 F.2d at 1180 (citation omitted).

Bata contends that she was treated differently from other SFCU employees because she was terminated, instead of being disciplined, for absenteeism under SFCU's "absence control program". She argues that, in these circumstances, at a minimum, she should have been given a "leave of absence" for medical reasons. (Plaintiff's Response, p. 6). Bata points out that SFCU maintains an "absence control program" which requires that four "levels of action" be taken against an employee "based on the number of absences during any 12 month period". Those steps are outlined as follows:

> (1) after "five absences", the employee will be "counsel[ed]" by a supervisor "to determine if there are any special circumstances surrounding such absences and to impress upon the employee why it is to his or her advantage to have a good attendance record";
> (2) after "six absences", the employee will receive a written "warning" and will have a "serious discussion" with his or her supervisor or the president of SFCU.
> (3) after "eight absences", the employee's "[s]upervisor will review the circumstances of the employee's absenteeism with [SFCU's] [p]resident" and, if appropriate, place the employee on a "90-day probation" period.
> (4) finally, "[a]ny violation (unexcused absence) by the employee during the 90-day probation period ... will result in termination of the employee."

(Exhibit 4, SFCU's "Absence Control Program" ["Absence Control Program"], Docket Entry #29). Further, SFCU has a policy which states that it "may, at management's discretion, place an employee on a leave of absence due to consecutive absenteeism." (Exhibit 4, SFCU Leave of Absence Policy, p. 31, Docket Entry #29).

Bata has presented deposition testimony from one of her supervisors, Janice McDaniel ("McDaniel"). McDaniel states that, if an SFCU employee "had excess absenteeism, instead of just letting them go we would put them on leave of absence without pay." (Exhibit C, Deposition of Janice McDaniel ["McDaniel Deposition"], p. 75, Docket Entry #29). McDaniel testified that she was familiar with one other employee who was disciplined for excessive absenteeism under SFCU's absence control program. (McDaniel Deposition, p. 92). In part, McDaniel testified as follows:

> Q. [Bata's Attorney] ... Do you recall any employee that you've put on probation .... because of absenteeism?
> A. [McDaniel] Yes, I do.
> Q. ... Tell me that person's first name, for privacy purposes, just tell me their first name.
> A. Lynn.
> Q. Was Lynn pregnant?
> A. No.
> Q. What was Lynn's problem with absenteeism, other than she was excessively absent?
> A. She just missed too many days.
> Q. Why was she missing work, do you know?
> A. She would call in sick.
> Q. And did she give a doctor's excuse when she called in sick?
> A. No.
> Q. She was just calling in sick because, you felt, because she just didn't want to go to work, is that right?
> ...
> A. Yes.
> Q. Was she warned?
> A. Yes.
> Q. And she was ultimately put on probation, correct?
> A. Correct.

Q. And what did that probation entail to your recollection?
A. Just that she be there every day for a certain number of days and then she would be on probation.
Q. And did she ultimately succeed in that probation?
A. Yes.

(McDaniel Deposition, pp. 92-93).

Bata argues that, because she was terminated, and "Lynn" was merely disciplined according to the "levels of action" set out in SFCU's absence control program, there is a genuine issue of material fact on whether other employees were treated more favorably than she. (Plaintiff's Response, p. 6). From the evidence Plaintiff has submitted, the court assumes for these purposes, that Plaintiff has established a *prima facie* case under Title VII.

Defendant argues that, even if Plaintiff can make a *prima facie* case, her federal claims fail because there was a legitimate nondiscriminatory reason for her termination. (Defendant's Motion, p. 7). Defendant claims that Bata's absences constituted a "voluntary abandonment of her job" and so it "had no choice but to terminate her employment status." (Defendant's Motion p. 9). An employer's proffered reason cannot be proven to be a "pretext for discrimination" unless it is shown both that the reason was false, and that discrimination was the real reason." *Walton v. Bisco Indus. Inc.*, 119 F.3d 368, 369 (5th Cir. 1997)(*quoting Hicks*, 509 U.S. at 515). A plaintiff can avoid summary judgment on that issue, or judgment as a matter of law, only if the evidence, taken as a whole, establishes the following:

> (1) the presence of a fact issue on whether each of the employer's stated reasons actually motivated the employer; and
> (2) a reasonable inference that [gender or pregnancy] was a determinative factor in the actions of which plaintiff complained.

Rhodes, 75 F.3d at 994 (*citing Hicks*, 509 U.S. at 510-11); *see also Walton*, 119 F.3d at 369 (citations omitted). This two-pronged standard "makes clear that a plaintiff must present evidence sufficient to create a reasonable inference of discriminatory intent in order to avoid summary judgment." *Grimes*, 102 F.3d at 141 (*citing LaPierre*, 86 F.3d at 450 and *Rhodes*, 75 F.3d at 994).

In this instance, the court concludes that Bata has shown that a genuine issue of material fact exists on whether other SFCU employees were treated more favorably than she under Defendant's absence control program. *Mayberry*, 55 F.3d at 1090 (*citing Little*, 924 F.2d 97; *Smith*, 891 F.2d at 1180; *Davin*, 678 F.2d at 570). This evidence is also sufficient to create a genuine issue of material fact, and a "reasonable inference of discrimination", sufficient to rebut Defendant's motion for summary judgment, on whether its reason for terminating Bata was a pretext for discrimination. It follows that summary judgment, on Plaintiff's Title VII claim, should be denied. (Docket Entry #26).

B. Wrongful Discharge Under Texas Law

SFCU contends that Bata's claim for wrongful discharge fails, as a matter of law, because she is an "employee-at-will" who could be terminated for any reason. (Defendant's Motion, p. 13). Indeed, the Fifth Circuit has recognized that, in Texas, "employers generally may terminate at will employees who work for indefinite terms." *Mayon v. Southern Pacific Transp. Co.*, 805 F.2d 1250, 1253 (5th Cir. 1986)(citations omitted). However, it is well established that the protections afforded by Title VII are an exception to the employment-at-will doctrine. *See* Cyndi Benedict *et al.*, *Employment and Labor Law*, 50 SMU L. REV. 1101, 1171 (1997); Cynthia L. Eastland, *Wrongful Discharge in an At-Will World*, 74 TEX. L. REV. 1655, 1659 (1996). Therefore, Bata's status as an at-will employee does not affect her claims under either statute and those issues remain for trial.

C. Intentional Infliction of Emotional Distress

Under Texas law, to prevail on a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) that the defendant acted intentionally or recklessly; (2) that the conduct was extreme and outrageous; (3) that the defendant's actions caused plaintiff emotional distress; and (4) that the resulting emotional distress was severe. *Hirras v. National Railroad Passenger Corp.*, 95 F.3d 396, 400 (5th Cir. 1996)(*citing Mattix-Hill v. Reck*, 923 S.W.2d 596, 597 (Tex. 1996); and *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)). "Proving intentional conduct, even conduct meant to cause distress, is not sufficient." *Garcia v. Andrews*, 867 S.W.2d 409, 412 (Tex. App.--Corpus Christi 1993, no writ). "Conduct is outrageous, for purposes of an intentional infliction of emotional distress claim, if it surpasses all bounds of decency, such that it is utterly intolerable in a civilized community." *Ward v. Bechtel Corp.*, 102 F.3d 199, 203 (5th Cir. 1997)(*quoting Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 (5th Cir. 1996) and *Ugalde v. W.A. McKenzie Asphalt Co.* 990 F.2d 239, 243 (5th Cir. 1993)). It is well-settled that "[l]iability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." *Ward*, 102 F.3d at 203 (citations omitted); RESTATEMENT (SECOND) OF TORTS § 46.

Here, Bata contends that the Defendant's intentional acts of discrimination caused "severe emotional distress." (Complaint ¶¶ 16-20). But the Fifth Circuit has held, repeatedly, that "[a]n employer's conduct, even if a Title VII violation, rises to the level of 'extreme and outrageous' only in 'the most unusual cases.'" *Hirras*, 95 F.3d at 400 (*citing Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994)(citations omitted)). In this circuit, "a claim for intentional infliction of emotional distress will not lie for mere 'employment disputes'" and, it is well settled

CliбPDF - www.fastio.com

that termination, alone, will not support "a claim for intentional infliction of emotional distress", under Texas law. *MacArthur v. University of Texas Health Ctr.*, 45 F.3d 890, 898 (5th Cir. 1995); *Johnson v. Merrell Dow Pharms., Inc.*, 965 F.2d 31, 33 (5th Cir. 1992); *Poore v. E.I. Du Pont de Nemours and Co.*, 888 F. Supp. 792, 795 (S.D. Tex. 1995). "The range of behavior covered in 'employment disputes' is quite broad". *Merrell Dow*, 965 F.2d at 33. The Fifth Circuit has recognized that

> [i]n order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee. Neither is termination. However, ... [a]n employer will not be held liable for exercising its legal right to terminate an employee, 'even though he is well aware that such [action] is certain to cause emotional distress.'

Merrell Dow, 965 F.2d at 34; *Randall's Food Markets v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). Bata has not shown that her claims involve anything beyond an "employment dispute." *MacArthur*, 45 F.3d at 898; *Merrell Dow*, 965 F.2d at 33; *Poore*, 888 F. Supp. at 795. It follows that she has not demonstrated that a genuine issue of material fact exists on whether Defendant's actions were so outrageous as to be considered "utterly intolerable" or "beyond all possible bounds of decency." *MacArthur*, 45 F.3d at 898. Accordingly, Defendant's motion for summary judgment on Bata's intentional infliction of emotional distress claim should be granted.

4. Conclusion

Based on the foregoing, it is

RECOMMENDED that Defendant's motion for summary judgment be GRANTED, in part, and DENIED, in part. (Docket Entry #26).

The Clerk of the court shall send copies of this memorandum and recommendation to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided will bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas, this 28th day of August, 1998.

MARY MILLOY
UNITED STATES MAGISTRATE JUDGE